evidence:

> As stated, the burden of showing falsity has been imposed upon the plaintiff in First Amendment cases. [citations omitted] Such a standard of proof seems implicit however, in the stated requirement in *New York Times* that plaintiff has the burden of showing by clear and convincing proof that publication was with knowledge of falsity or with reckless disregard as to falsity *vel non*. I conclude for the same constitutional reasons giving rise to this stringent proof requirement that the clear and convincing proof standard would also apply to proving that the statement was false in the first instance.

Id. at 722-723.

Firestone is not the only case that discussed this issue. The U.S. District Court for the District of Columbia laid out a strong argument for the clear and convincing standard of proof by stating it "would resolve doubts in favor of speech when the truth of a statement is difficult to ascertain conclusively." *Robertson v. McCloskey*, 666 F.Supp. 241, 248 (D.D.C. 1987). The court stated that for public-figure plaintiffs to prove actual malice, "they must, of necessity, show by clear and convincing evidence that the defendant knew the statement was false or acted in reckless disregard of its truth." *Id.* It also reasoned that to "instruct a jury that a plaintiff must prove falsity by a preponderance of the evidence, but must also prove actual malice, which to a large extent subsumes the issue of falsity, by a different and more demanding standard is to invite confusion and error." *Id.* That court's conclusion has also been used to explain the reasoning behind applying the clear and convincing standard. *See DiBella,* 403 F.3d at 114 (stating "courts have found good reason to favor the higher standard of proof" before quoting *Robertson*).

However, *Robertson's* argument no longer applies in the

District of Columbia's federal courts. Without discussion or explanation, the U.S. Court of Appeals for the District of Columbia ruled the preponderance of the evidence standard applies. *See Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1293 (D.C. Cir. 1988) ("plaintiff must demonstrate by at least a fair preponderance of the evidence that the allegedly defamatory statement is false").

While many states have yet to decide this issue, eight of the ten that have ruled on the issue favor the clear and convincing standard. 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §§ 3.4, at 3-14 n.46 (2005). *See also*: *Deutsch v. Birmingham Post Co.*, 603 So.2d 910 (Ala. 1992); *Barnett v. Denver Publ'g Co., Inc.*, 36 P.3d 145 (Colo.Ct.App. 2001); *Carr v. Bankers Trust Co.*, 546 N.W.2d 901 (Iowa 1996); *Baston v. Shiflett*, 602 A.2d 1191 (Md. 1992); *Hoch v. Prokop*, 507 N.W.2d 626 (Neb. 1993); *Newman v. Delahunty*, 681 A.2d 671 (N.J. 1994); *Nevada Indep. Broad. Corp. v. Allen*, 664 P.2d 337 (Nev. 1983); and *Pritt v. Republican Nat'l Comm.*, 557 S.E.2d 853 (W.V. 2001).

Only a small minority of courts have applied the preponderance of the evidence standard. *DiBella*, 403 F.3d at 114. The courts made these decisions either without discussion or based upon outdated case law. The Ninth Circuit relied on the overturned *Goldwater* case to support its decision. *Rattray*, 51 F.3d at 801. The District of Columbia and Massachusetts made their decisions without discussion. *Liberty Lobby, Inc.*, 838 F.2d at 1292; *National Ass'n of Gov't Employees/Int'l Bhd. of Police Officers v. BUCI Television, Inc.*, 118 F.Supp. 2d 126, 130 (D.Mass. 2000).

Texas, the other jurisdiction to apply the preponderance of the evidence standard, exemplifies the confusion surrounding this issue. In the underlying case, the Texas Supreme Court applied the preponderance of the evidence standard.

Bentley v. Bunton, 94 S.W.3d 561, 587 ("We have not required proof of falsity to be more than a preponderance of the evidence, and neither has the United States Supreme Court."). The court cited *Turner*, 38 S.W.3d 103, as controlling precedent that the preponderance standard applies. However, in deciding the issue, *Turner* discussed the split circuit opinions — using *Buckley* to show the clear and convincing side and *Rattray* and *Goldwater* to show the preponderance side — but never mentioned that *Buckley* and *Goldwater* contradict each other or that *Rattray* was based on *Goldwater's* outdated logic. *Turner*, 38 S.W.3d at 117. Upon this foundation, Texas has declared that a plaintiff need only prove falsity by a preponderance of the evidence.

The Texas case is a prime example of how courts addressing this issue have been provided very little guidance. Interestingly, this confusion even showed up in this Court as it has used the outdated *Goldwater* case as its first example supporting the preponderance of the evidence standard. *Harte-Hanks*, 491 U.S. at 661, n.2.

Courts looking at this issue have relied on concurrences, dicta, and cases that have not been followed in their own jurisdiction.

II. As a matter of public policy, this Court should clarify this question to provide consistent First Amendment protection.

This Court should adopt a clear policy regarding the standard of proof necessary to prove falsity in a defamation claim. To ensure that political speech in Texas does not receive less First Amendment protection than similar political speech would receive in most other parts of the country,

amicus urges this Court to grant this writ and provide consistent First Amendment protection to all publications.

Proving falsity by the preponderance of the evidence contradicts this Court's First Amendment protection by allowing a plaintiff, in essence, to apply a balancing test toward the truth. A plaintiff need only show the statement was more than likely than not to have been false. If the plaintiff can merely call the falsity into doubt, the plaintiff can recover without ever proving the statement was false. This conflicts with the "breathing space" required by the First Amendment in *New York Times,* 376 U.S. at 272, even if it ends up protecting false speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."). This "breathing space" acknowledges that "erroneous statement is inevitable in free debate." *New York Times,* 376 U.S. at 271. But it also acknowledges that to allow "uninhibited, robust, and wide-open" debate, these erroneous statements must be tolerated. *Id.* at 270.

In order to provide "breathing space" for speech, courts must demand plaintiffs prove falsity in the same manner plaintiffs must prove actual malice — with clear and convincing evidence. *Gertz*, 418 U.S. at 342. This "removes the chill of self-censorship by assuring that doubts concerning conduct arguably at the margins of bad faith will be resolved in favor of publishers." *Robertson*, 666 F.Supp. 241, 248. Applying the clear and convincing standard to falsity resolves close questions in favor of publishers. Tipping the scales toward free speech in close cases provides the "breathing space" necessary for "robust" debate. "Indeed, as a practical matter, public-figure plaintiffs already bear such a burden, for in order to prove actual malice they must, of necessity, show by clear and convincing evidence that the defendant knew the statement was false or acted in reckless disregard of its truth."

Id. "Given the interrelationship between fault and falsity, however, the better view holds that the plaintiff must come forward with clear-and-convincing proof of falsity rather than a mere preponderance." SANFORD, LIBEL AND PRIVACY 219-220 (2d ed. 2001 Supp.)

In close or complicated cases, the clear and convincing standard leans toward protecting speech. This prevents courts from becoming a final arbitrator of the truth of publications in difficult cases. "In other words, courts should refrain from offering official determinations of what is true and what is false in all but the clearest cases because an error in the court's judgment in favor of the plaintiff would produce a much greater cost in terms of the imposition of the 'official truth' and self-censorship than would a similar error in favor of the defendant." Franklin & Bussel, *The Plaintiff's Burden and the First Amendment: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 864-65 (1984).

In the jurisdictions that fail to recognize the close relationship between actual malice and falsity, those applying the preponderance of the evidence standard, publishers lose the full protection of the First Amendment. As a matter of public policy, this Court should provide clarify this issue to provide consistent First Amendment protection.

CONCLUSION

The courts' confusion over the proper standard of proof for plaintiffs to prove falsity is clear. A maze of conflicting decisions, dicta, concurrences and dissents provide the only guidance available to understand this issue. This confusion has caused some jurisdictions to tighten the "breathing space" provided to speech under the First Amendment. The underly-

ing case presents an opportunity for this Court to clarify this issue and *amicus* respectfully urges this Court to grant this writ.

Dated: February 23, 2006

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED
MAR 31 2006
OFFICE OF THE CLERK

No. 05- 923

In the
Supreme Court of the United States

Joe Ed Bunton
Petitioner,
v.
Bascom W. Bentley III
Respondent.

On Petition for A Writ of Certiorari
to the Supreme Court of Texas

PETITION FOR REHEARING OF AN ORDER DENYING A WRIT OF CERTIORARI

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QUESTION TO RECONSIDER

1. Whether a public official plaintiff has the burden to prove falsity by a preponderance of the evidence or clear and convincing evidence?

LIST OF PARTIES

The caption of the case contains the names of all the parties

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PETITION FOR REHEARING OF AN ORDER DENYING A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 44 .2 the petitioner moves the Court to grant this petition for rehearing of an order denying a petition for a writ of certiorari.

SUMMARY

This court has never decided the question: By what standard must falsity be proven in a public official defamation case? The lack of a ruling by this Court has caused conflict and confusion in the federal circuit and state courts. As expositors of the Constitution, this Court should resolve this question now. Request the Court grant this petition for rehearing of an order denying a petition for a writ of certiorari and grant certiorari on this one question.

Lower courts all agree that this is a question of federal constitutional law. It is an important question about "freedom of speech" a fundamental right protected by the U.S. Constitution. This court has known the debate on this matter for many years. Seventeen years ago this Court chose to ". . . express no view on this issue."

The Brief *Amicus Curiae* of The Reporters Committee for the Freedom of Press in Support of the Petitioner makes two compelling points:

- "Inconsistent legal standards lead to self censorship of complicated or controversial stories."
- "To ensure that political speech in Texas does not receive less First Amendment protection that similar political speech would receive in most other parts of the country"

Other compelling reasons to grant this petition and decide this question are to:

- resolve the conflict in the Federal Circuits and state courts now;
- make defamation law less confusing for judges and juries;
- give people confidence about the legal consequences of their

actions; and

- provide more liberty in the public debate.

The lack of a decision has created a more confusing defamation doctrine that is already complex and irrational. Waiting to resolve this question could cause significant harm to patriotic citizens and limit the public debate. How much harm will be done before the Court gets the next opportunity to resolve this question? This case is ripe for resolution now.

NEVER DECIDED

HARTE-HANKS COM. V. CONNAUGHTON

In 1989 this court found that it was not necessary to decide this question. *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 661 n.2, 1989.SCT.43119,¶ 14, 81 (U.S. June 22, 1989) (VersusLaw)("There is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence. We express no view on this issue." (citations omitted)).

TURNER V.KTRK

Turner v. KTRK Television, Inc., 38 S.W.3d 103, 117, 2000.TX.0053473,¶54 (Tex. December 21, 2000) (VersusLaw)

> . . . Courts are divided on the burden that a public-figure plaintiff bears in proving falsity, and the United States Supreme Court has expressly reserved judgment on the issue. *Harte-Hanks Communications, Inc. v. Connaughton*, (citations omitted) . . . [N[either side has briefed or argued the burden of proof for falsity in this Court. Thus, **we are unwilling on this record to require clear and convincing evidence of falsity**.
> . . .

BENTLEY V. BUNTON

Bentley v. Bunton, 94 S.W.3d 561, 2002.TX.0005488,¶135, 404 (Tex. August 29, 2002)(VersusLaw) We have not required proof of falsity to be by more than a preponderance of the

evidence, *fn65 and neither has the United States Supreme Court. (footnote omitted)
fn65 Turner, 38 S.W.3d at 117.

CONFLICT AND CONFUSION

CONFLICT

For more than thirty years, without a decision on the standard of proof of falsity, there has been a void in the rule of law. This void has created conflicting rulings between the federal circuit courts; between the federal circuit courts and the highest state courts and conflict between the state courts.

Federal Circuit Versus Federal Circuit

There is a conflict between the decisions of the Second and Ninth Federal Circuit Courts as to what is the standard of proof of falsity in a public official defamation case. The Second Federal Circuit's decisions in *Buckley v. Littell,* 539 F.2d 882,1976.C02.40228 (2nd Cir. June 30, 1976)(VersusLaw) and *DiBella v. Hopkins,* 403 F.3d 102, 2005.C02.0000381,(2d Cir. April 4, 2005) (VersusLaw) required falsity to be proved by clear and convincing evidence. These opinions conflict with the Ninth Federal Circuit's decision in *Rattray v. City of National City,* 51 F.3d 793, 1994.C09.40941,¶53 (9th Cir. October 7, 1994.) (VersusLaw) that falsity is required to be proven by a preponderance of evidence. This conflict has existed for over 17 years.

The conflict of *Buckley* and *Rattray* is at the foundation of the Texas Supreme Court decision deciding that falsity requires proof by the preponderance of the evidence. *Buckley* and *Rattray* are cited by the Supreme Court of Texas decision in *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 2000.TX.0053473,¶54 (Tex. December 21, 2000). Justice Hetch wrote in this case, *Bentley v. Bunton*, 94 S.W.3d 561, 2002.TX.0005488 (Tex. 2002)(VersusLaw): "We have not required proof of falsity to be by more than a preponderance of the evidence." He cited *Turner* as the authority.

Federal Circuit Versus State Court

There is a conflict between the decisions of the Second Federal Circuit and the decisions of the Supreme Court of Texas. The issue in conflict is the standard of proof required to prove falsity.. The Second Federal Circuit's for the last thirty years has required falsity be found by clear and convincing evidence. *Buckley v. Littell,* 539 F.2d 882,1976.C02.40228, ¶31 (2nd Cir. June 30, 1976)(VersusLaw) *Buckley* replaced *Goldwater v. Ginzburg*, 414 F.2d 324, 1969.C02.40201 (2nd Cir. July 18, 1969) (VersusLaw) as the law of the circuit in 1976.

The 2002 decision of the Supreme Court of Texas in this case was "We have not required proof of falsity to be by more than a preponderance of the evidence, . . ." *Bentley v. Bunton*, ¶135. In this decision the Texas court cited its' 2000 *Turner* decision .

The *Turner* decision cited the *Goldwater and Rattray* cases that "held that public figures needed only to prove falsity by preponderance of the evidence. *Goldwater* had not been law in the Second Circuit since 1976. *Rattray* was decided in 1994 by the Ninth Federal Circuit adopting the outdated *Goldwater* decision.

State Court Versus State Court

The 2005 decision of the Second Federal Circuit in *DiBella* ¶64,67 compared the decisions of the states highest courts. Texas was the only state whose Supreme Court had decided for the preponderance of evidence standard. The Circuit Court found that the Supreme Court's of Alabama, Iowa, Nebraska, Connecticut, West Virginia and Maryland had decided on the clear and convincing standard.

CONFUSION

Complexity and Sheer Irrationality

History Professor Norman L. Rosenberg wrote in the opening page is his Book *Protecting the Best Man*:

The complexity, if not the sheer irrationality, of

> libel doctrines presents numerous problems for the lawyer who has to "try" a case; it can throw up many more for the historian "trying" an article or a book. Even William Prosser, a legal-writer who could generally create at least the illusion of doctrinal order out of a mass of chaotic precedents, admitted the impossibility of ordering defamation law. "**A great deal of the law of defamation . . . makes no sense,**" he confessed. (footnote omitted)

Courts Adopting Outdated Law

It is shocking that both the Ninth Federal Circuit Court and the Supreme Court of Texas cited and adopted *Goldwater*. *Goldwater* had not been good law in the Second Federal Circuit for 17 years when the Ninth Federal Circuit adopted it. Neither the Ninth Circuit nor Texas court presented any original logic to support their preponderance of evidence holding.

Flip-flopping (Changing Positions)

The changing positions on the issue of clear and convincing or preponderance standard of proof causes the appearance of confusion. Without a decision on this question from the US Supreme Court the lower courts have the discretion to change their interpretations.

Courts

For fifteen years the *Goldwater* decision setting the preponderance of evidence as the standard was the law in the Second Circuit. In 1976 the Second Circuit changed the standard in *Buckley* to clear and convincing evidence. Clearly this change confused the Ninth Federal Circuit and The Supreme Court of Texas.

Judges

Within two years, Justices Hecht and Owens changed their